

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

SVETLANA LOKHOVA,	.	Civil Action No. 1:19cv632
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	October 25, 2019
STEFAN A. HALPER;	.	10:00 a.m.
DOW JONES & COMPANY, INC.;	.	
THE NEW YORK TIMES COMPANY;	.	
WP COMPANY, LLC, d/b/a	.	
Washington Post;	.	
NBCUNIVERSAL MEDIA, LLC,	.	
d/b/a MSNBC; and MALCOLM	.	
NANCE,	.	
	.	
Defendants.	.	

. . . . .

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	STEVEN S. BISS, ESQ. Law Office of Steven S. Biss 300 West Main Street, Suite 102 Charlottesville, VA 22903
FOR DEFENDANT STEFAN A. HARPER:	TERRANCE G. REED, ESQ. ROBERT K. MOIR, ESQ. Lankford & Reed PLLC 120 N. Saint Asaph Street Alexandria, VA 22314 and ROBERT D. LUSKIN, ESQ. Paul Hastings LLP 875 15th Street, N.W. Washington, D.C. 20005

(APPEARANCES CONT'D. ON PAGE 2)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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ALSO PRESENT:

SVETLANA LOKHOVA

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 19-632, Svetlana Lokhova  
3 versus Stefan A. Halper, et al. Will counsel please note their  
4 appearances for the record.

5 MR. BISS: Judge Brinkema, good morning. I'm Steven  
6 Biss for the plaintiff.

7 THE COURT: Good morning.

8 MR. REED: Good morning, Your Honor. Terrance Reed,  
9 Robert Luskin, and Robert Moir for the defendant Stefan Halper.

10 THE COURT: Good morning.

11 MR. LUSKIN: Good morning.

12 MR. HUNDLEY: Good morning, Your Honor. John Hundley  
13 on behalf of The New York Times Company. With me is Dana  
14 Green, who is counsel at *The New York Times*. She's been  
15 admitted pro hac vice, and she'll be handling the argument on  
16 behalf of *The Times* today.

17 THE COURT: All right, thank you.

18 MR. HUNDLEY: Nice to see you.

19 MR. CURRAN: Good morning, Your Honor. Patrick  
20 Curran from Davis Wright Tremaine, on behalf of NBC and *The*  
21 *Washington Post*, and with me is my colleague, Laura Handman,  
22 who will be handling oral argument for both parties. She's  
23 been admitted pro hac vice.

24 THE COURT: All right, good morning.

25 MR. KELLEY: Good morning, Your Honor. Matthew

1 Kelley for defendant Dow Jones & Company. With me is my  
2 colleague, Seth Berlin, who is admitted pro hac vice and will  
3 be doing the oral argument.

4 THE COURT: All right, thank you.

5 And I think local counsel are probably going to have  
6 to sit in the -- outside of the well. We just don't have  
7 enough chairs for you-all, all right?

8 All right. As you know, this case was originally  
9 assigned to Judge Ellis, who asked that it be reassigned. I  
10 only got it on the basis of the random computer draw Monday,  
11 and obviously, there's a great deal of material here. I have  
12 gone through not every single word but a good deal of it, so I  
13 have a very strong idea about what's going on, but we're going  
14 to use this morning as an opportunity for you, each side to  
15 present any additional information that may not have been fully  
16 covered in your papers.

17 So the first thing is I wanted to know, is there --  
18 and I believe I'm correct on this -- is there any disagreement  
19 among any of you that there is not a one-year statute of  
20 limitations for defamation cases? I believe everybody's  
21 agreeable, whether we're using Virginia law, District of  
22 Columbia law, or New York law, in all three jurisdictions, and  
23 those are the only three whose law would be relevant here, that  
24 it's a one-year statute of limitations.

25 Mr. Biss, I believe you agree with that.

1 MR. BISS: I do agree with that, Your Honor, yes.

2 THE COURT: All right. And I believe all the defense  
3 have argued that.

4 (Defense counsel nodding heads.)

5 THE COURT: All right, so that's it. Well, then it  
6 seems to me that that's the first issue that we have to be  
7 talking about, and that is, all defendants have raised the  
8 issue that with the exception of just three, arguably four  
9 articles -- and I'm going to use the word "article" even though  
10 I recognize that some of what we're talking about here are  
11 tweets or some of the new type of electronic communications --  
12 but what we're talking about here, it seems to me, are four  
13 articles, that anything else that's referenced in the complaint  
14 occurred outside of the one-year statute of limitations.

15 So, Mr. Biss, I think you have to address that issue  
16 first.

17 MR. BISS: Your Honor, may it please the Court. I'm  
18 Steve Biss. I represent the plaintiff, Svetlana Lokhova.  
19 Svetlana Lokhova is with me at counsel table.

20 Judge, the question here is republication.  
21 Obviously, the articles were published on the dates as  
22 represented in the complaint. The question here is were they  
23 republished and when were they republished.

24 So I start with the standard of review, because I  
25 think it's intertwined into this issue, because I think the

1 question of what is a republication and when did it occur are  
2 essentially issues of fact. In paragraphs 5, 87, 98, 112, 122,  
3 128, 158, 163, and 172 specifically, the plaintiff alleges that  
4 there was a republication within one year preceding the filing  
5 of this case.

6 We have cited in our briefs two cases and I want to  
7 talk about a third case that, that is cited in one or more of  
8 the defendants' cases. It's a case within a case, but I want  
9 to bring it to Your Honor's attention.

10 The two Virginia cases that talk about this issue of  
11 republication are one from the Eastern District of Virginia and  
12 one from the Western District of Virginia. The Eastern  
13 District case is the *Dragulescu* case that's cited -- and I hope  
14 I pronounced that right, but I think it's right, right  
15 enough -- the *Dragulescu* case, and that was a defamation case  
16 involving the republication of defamatory statements, and what  
17 the court held in that case is that each successive publication  
18 of an old or preexisting defamatory statement gives rise to a  
19 new cause of action under Virginia law, and that's a -- and I  
20 believe they cited to a Fourth Circuit opinion, and it's in  
21 our, in our briefs.

22 The other case is the Western District case, the case  
23 that is a case that was decided in 2016 and thereupon on  
24 summary judgment and thereafter tried to a verdict, it's the  
25 *Eramo v. Rolling Stone* case, and the -- what Judge Conrad held

1 in that particular case was that republication occurs when the  
2 original defamatory statement is affirmatively reiterated or  
3 redistributed to a new audience.

4 And so it's with those -- it's with those two cases  
5 and then, and then one other that was actually decided by the  
6 Eastern District here in the Alexandria Division, and I think  
7 it was Judge Ellis who decided it, it's a case that we also  
8 cite, it's *Doe v. Roe*, and *Doe v. Roe* stands for the  
9 proposition, and it says this exactly, that separate  
10 publications of the same defamatory content constitute  
11 republication, and there's a new -- the new statute of  
12 limitation accrues with each republication. So that that's the  
13 legal framework in Virginia.

14 So the defendants in their briefs have raised this  
15 issue of the hyperlinks, and it's a -- it's an issue that I  
16 could not find any federal or state precedent in Virginia to  
17 address this. There are cases from New York. There are cases  
18 that I'm aware of from the Western District of Kentucky and  
19 other jurisdictions, Pennsylvania. There's a Third Circuit  
20 case that the defendants cite that talk about the hyperlinks.

21 Now, we have alleged in the complaint -- and my first  
22 point is we have alleged republication, and I, and I submit to  
23 Your Honor that is sufficient -- in alleging a defamation case,  
24 that's sufficient to take it past the 12(b)(6) stage, because  
25 the question then arises what was republished. It's a factual

1 issue as to what it was that was republished within the one  
2 year. Was it simply a hyperlink, or was it a hyperlink plus  
3 content?

4 In the, in the defendants' cases, there's a case they  
5 cite of the *Biro v. Condé Nast* case, and in *Biro v. Condé Nast*,  
6 there's a discussion of whether or not the, the simple  
7 republication of a hyperlink is sufficient, and in *Biro*, they  
8 said it wasn't sufficient, but in *Biro*, they cite to a case  
9 called *Enigma Software*, and that's at 194 F.Supp.3rd 263, and  
10 it's a Southern District of New York case from 2016, and in  
11 that case, the Southern District of New York very clearly and  
12 emphatically pointed out that where, where there's a tweet that  
13 includes the plaintiff's name and additional -- republishes  
14 additional content from the prior publication, that is  
15 sufficient to constitute a, a republication.

16 I submit to Your Honor I don't think the Court can  
17 resolve these factual issues as to what was included in, in the  
18 tweets, what was a part of the republication, whether it  
19 included content or whether it didn't include content. I  
20 submit those are factual issues. They could be raised and  
21 might be raised on summary judgment, but they might not be  
22 raised on summary judgment.

23 At this stage, the plaintiff has to allege a  
24 republication, and I know from looking at multiple of the  
25 tweets that were, were made in the last -- within the last

1 year, that content was certainly republished, content such as  
2 Ms. Lokhova compromised General Flynn, Ms. Lokhova is a, is a  
3 Russian intelligence official.

4 THE COURT: Well, why should the law, though, given  
5 the nature of the way in which people are communicating these  
6 days, why should the law not be that the tweeter be the one  
7 held liable? Because the danger, and this has been recognized,  
8 you know, in cases, is that to the extent that one accepted  
9 your argument that every time somebody tweets a prior article,  
10 that somehow that changes the statute of limitations, you'd  
11 essentially have no rational statute of limitations any longer.

12 So there has to be some rule of reason that would  
13 actually temper the approach that you're taking.

14 MR. BISS: Judge, I understand -- I fully understand  
15 that. On the other side of that equation, though, is a  
16 counterbalancing interest of protecting the reputation of the  
17 person who has been defamed.

18 So today, as Your Honor correctly pointed out, we  
19 live in a different time. Now you can hit a button on your  
20 phone or on a computer, and you can send a defamatory message  
21 to 30,000 people, and then they in an instant can resend it to  
22 a million or more people.

23 And so I think the counterbalancing interest here is,  
24 is outweighed by protecting the -- in this modern age, by  
25 protecting the rights of the individual, the liberty interest

1 of the individual in their name and reputation by holding the  
2 original defamer liable for interjecting the message, the  
3 defamatory post, if you will, into the stream of commerce,  
4 because once it gets into the stream of commerce, then these  
5 devices allow anybody to republish it, to over and over and  
6 over.

7           The, the -- in the, in the case of *Adelson v. Harris*,  
8 this was a case involving a hyperlink, this is a case that was  
9 referred to in one of the cases, it's *Adelson v. Harris* at 973  
10 F.Supp.2d 467, this is a Southern District of New York case,  
11 and it was a question of a hyperlink. It was a hyperlink in an  
12 article, and the question was what is a hyperlink, and that,  
13 that got me looking at the case, and in the *Adelson* case, they  
14 defined a hyperlink as the 21st Century equivalent of a  
15 footnote. That's what they defined a hyperlink as.

16           And if that's the case, then publishing the hyperlink  
17 is essentially directing the, the -- is essentially  
18 republishing the defamatory statement in the form of a  
19 footnote.

20           The SEC, the Securities and Exchange Commission, in  
21 Release No. 33-7233, this is also cited in *Adelson*, said that  
22 providing hyperlinks on an online offering is akin to including  
23 the contents of the second cite in the same envelope as the  
24 prospectus, and, Judge, from the plaintiff's perspective in  
25 this case, including -- for a third party to include those

1     hyperlinks is essentially a republication of the same  
2     defamatory material, because the hyperlink serves as the -- as  
3     essentially the equivalent of a footnote according to the, the  
4     Adelson case at page 484.

5             And it happens --

6             THE COURT: I'm sorry, but then under that theory,  
7     the third party who does that might be liable.

8             MR. BISS: And there's no --

9             THE COURT: And, I'm sorry, within the evidence  
10    that's in this record, as I understand it, there's only -- only  
11    *The New York Times* has one article that would have been  
12    hyperlinked that might be within the statute of limitations if  
13    the Court accepted your theory, but that doesn't save, for  
14    example, *The Wall Street Journal*, which I don't believe there  
15    are any of their articles where they themselves then  
16    hyperlinked to a prior article.

17            MR. BISS: Judge, the, the -- *The Wall Street Journal*  
18    article was, was hyperlinked -- and I just -- for purposes of  
19    preparing today's argument, I took three examples from the  
20    allegations in the complaint of publications -- of hyperlinked  
21    publications by third parties within the, within the one-year  
22    statute of limitations.

23            THE COURT: Yeah, but that's third parties, and if  
24    you're looking at a hyperlink as a footnote, then that third  
25    party published that footnote, and it seems to me that there

1     *The Wall Street Journal* would not be liable. If *The Wall*  
2     *Street Journal* itself hyperlinked to its own article, it seems  
3     to me that there might be then, might be then a basis to find  
4     that that article had been dragged into the statute of --  
5     within the statute of limitations.

6             But even *Weaver* recognized, and that's the seminal  
7     case that I think you really based your initial argument on,  
8     which is a Virginia Supreme Court case from, what, 1950, before  
9     the internet, I think, was even invented, and so obviously  
10    didn't have any concept of the new way in which people  
11    communicate and disseminate information, but even that case did  
12    draw some distinction between republication by the original  
13    person or by third parties, and I think that's a line that has  
14    to be carefully considered.

15            MR. BISS: I, I agree with that, but I think that  
16    the, the end result is exactly the same. So if the original  
17    defamer republishes, that's a -- that's a republication for  
18    which the original defamer is liable, but by the same token,  
19    under *Weaver*, the original defamer is liable for a  
20    republication by third parties under the common law, and *Weaver*  
21    stands for that proposition, and it was a 1957 case, but it was  
22    cited with -- it was cited with authority by the Eastern  
23    District of Virginia, I believe, in *Dragulescu*, and it is --  
24    it's the, it's the law as far as I can tell up until this day.  
25    Without any question, it's the law in, in Virginia.

1           So in the, in the content -- in the context of -- in  
2 the context of modern business, it also makes sense to  
3 recognize that a hyperlink is a republication, because a lot of  
4 these internet companies, take Twitter, for example, Twitter  
5 will publish terms of service, and it will, it will publish  
6 a -- it will link those terms of service with a hyperlink. So  
7 when you set up an account with Twitter, you have to click on  
8 the hyperlink in order to -- they don't publish the terms of  
9 service, but they're just -- it's just a hyperlink which you're  
10 obligated to click on if you, if you want to click on it, but  
11 if you don't click on it, you're still bound by it.

12           My point is that in modern business, we also  
13 recognize that the hyperlink serves a useful purpose, and that  
14 is, it constitutes a publication of facts succinctly by means  
15 of a -- by means of a, of a bridge or by means of an  
16 electronic, what they, what they described in the *Adelson* case  
17 as highlighted text or image that permits a reader to view  
18 another document. That's how they, they identified and defined  
19 a hyperlink.

20           But in terms of modern business, we treat it as a  
21 publication that, that allows, facilitates now, facilitates the  
22 much more economical presentation of material.

23           In our case, we've alleged republication. It's a  
24 factual issue as to what these tweets that are in the  
25 amended -- in the amended complaint say, whether they include

1 simply hyperlinks or whether they include hyperlinks and more.

2 And, Judge, I think that's a factual issue that takes  
3 it beyond the 12(b)(6) stage.

4 THE COURT: All right. Let me hear then from defense  
5 counsel as to the issue of republication. And because there  
6 are so many of you, I'm going to ask you once again to  
7 reidentify yourselves and which party you represent.

8 MR. BERLIN: Good morning, Your Honor. I'm Seth  
9 Berlin, appearing on behalf of Dow Jones *Wall Street Journal*.  
10 Let me see if I can try and unravel a little bit of what  
11 Mr. Biss is saying. To start, Your Honor is correct that the  
12 original *Wall Street Journal* article that it published was two  
13 years and two months before the complaint was filed, and so  
14 claims premised on that article are clearly barred by the  
15 statute of limitation, and I understand Mr. Biss to be saying  
16 he agrees with that.

17 What we're talking about is in the case of *The Wall*  
18 *Street Journal*, four tweets that are identified in paragraph  
19 112 of the complaint that are indisputably published by  
20 somebody else, not *The Wall Street Journal*, and include a  
21 hyperlink, okay?

22 That is not the subject of a defamation action for  
23 three reasons: Number one, that's not publication, right? A  
24 hyperlink is not publication. The cases are uniform in this.  
25 There's a -- there are both Third Circuit and Sixth Circuit

1 cases that collect a mass of authority.

2 In the *Adelson* case which Mr. Biss references, which  
3 was conveniently for me my case, the reference to the 21st  
4 equivalent of a footnote is exactly that. If, if *The Wall*  
5 *Street Journal* published an article and someone later cited to  
6 that article in a footnote in a book, that is not a  
7 republication of *The Wall Street Journal* either for the author  
8 of that book and especially not for *The Wall Street Journal*,  
9 and if that's the analogy, that's essentially what a hyperlink  
10 does in modern -- a modern America. That's what Judge Oetken  
11 in a very thoughtful opinion discussing it at length came to  
12 the conclusion in the *Adelson* case.

13 So that's not a publication, number one. So the  
14 first thing you would need for a defamation claim within the  
15 statute of limitations is publication, and you don't have that.

16 Here you have a second thing, which is that if you  
17 look at those four tweets that are identified, none of them is  
18 themselves published within the one year prior to the filing of  
19 the complaint. So even if that constituted publication, it's  
20 not publication within one year of the filing of the complaint,  
21 regardless of what they said, right?

22 And in that regard, I should add that Mr. Biss says  
23 it's a factual issue with what else got published with the  
24 hyperlink, right? Well, first of all, that's pled in the  
25 complaint, so that's something that we can do based on the

1 pleadings; but second, somebody else's additional comments are  
2 not chargeable to *The Wall Street Journal*. The only thing  
3 that's chargeable potentially to *The Wall Street Journal* is  
4 what it published and somebody republished.

5           So what's really going on here is Mr. Biss is relying  
6 on the principal that's articulated in that 1957 case of *Weaver*  
7 to say somehow, even though *The Wall Street Journal* didn't  
8 publish it, it's not publication and it's not within the year,  
9 *The Wall Street Journal* somehow is still responsible for that  
10 because it was the natural and probable consequence of the  
11 original publication that somebody would retweet that, and that  
12 is barred by the single publication rule, which basically  
13 tweets the date of publication for a mass media publication as  
14 the first date on which it's made available to the public,  
15 which in this case is two years and two months prior to the  
16 filing of the complaint and is similarly true, I believe, for  
17 the other -- the defendants that Your Honor alluded to. So  
18 under the single publication rule, there would be no claim.

19           And what Mr. Biss is essentially arguing, as I  
20 understand it, is that somehow the *Weaver* approach is an  
21 exception to the single publication rule, but that's not true  
22 even under *Weaver* itself, because *Weaver* involved a letter that  
23 was written by a lender, the defendant, to the Navy, right, and  
24 isn't involving a mass media publication, and it expressly  
25 says, hey, there's different rules for mass media publications,

1 and it cites another case from in that case the Third Circuit  
2 that recognized the single publication rule, and it then went  
3 on to say that the publisher of a newspaper or magazine is not  
4 responsible for the acts of third persons who after the  
5 original publication sell or distribute copies of the newspaper  
6 or magazine to others.

7 That's exactly what we're talking about here, albeit  
8 in the context not of the internet but in print publication.

9 The cases that Mr. Biss references actually support  
10 this position. So if you look at the *Dragulescu* case, which  
11 is, I believe, Judge Payne's decision from the Richmond  
12 Division, Judge Payne -- and that's a case again about a  
13 non-mass media publication, and he says: Even applying it in  
14 that context, the single publication followed by successive or  
15 additional readings of the publication gives rise to only one  
16 cause of action. This single publication rule applies when  
17 subsequent audiences read the same original (and allegedly  
18 defamatory) document, and is accepted by the majority of states  
19 and Virginia.

20 It then takes up *Weaver*, right? So the plaintiff in  
21 that case, like Mr. Biss said, well, what about *Weaver*? And  
22 the, the plaintiff argues that -- this natural and probable  
23 consequence argument, and it says: *Dragulescu* argues that this  
24 principle saves her defamation claim.

25 It does not, and it goes on to explain that even in

1 that case, that is not sufficient to overcome the premise of  
2 the single publication rule.

3 The same is true in *Doe v. Roe*, where the court --  
4 let me flip my page here -- the court again invokes the single  
5 publication rule.

6 And so what we have here, Your Honor, is we have no  
7 case that I'm aware of in which a mass media publication is  
8 subject to *Weaver*, and we have a number of cases involving  
9 individual non-mass media publications where judges of this  
10 Court are applying the single publication rule. *Katz v. Odin*  
11 is another one that Judge Ellis decided, and it's cited in the  
12 parties' papers where that's the case.

13 And so given all of that, Your Honor, there is no --  
14 there is no publication that occurs within the one-year statute  
15 of limitations that would allow a claim to proceed.

16 And let me just say one last thing, if I could, about  
17 *Weaver*, Your Honor. In that case, as I mentioned, it was a  
18 letter written to the Navy, and one of the things that was  
19 specific to that case was that the letter went on to say: We  
20 feel that if someone in a supervisory position will explain  
21 Mr. Weaver's liabilities and the possible effects of them, he  
22 will be induced to bring his account to date and pay promptly  
23 thereafter. They were trying to collect a debt, right?

24 So the court found in that unique set of  
25 circumstances that a jury could conclude from that statement

1 that appellees were requesting that the letter be republished  
2 to his supervisors, right? We're writing a letter saying:  
3 Please pass this along to his supervisors so they'll talk to  
4 him.

5 And in those circumstances, when they then go and  
6 pass it along to his circumstances (sic), that is held to be  
7 the natural and probable consequence of writing such a letter  
8 in that one case.

9 But in the case of a newspaper or a magazine or book,  
10 any other mass media publication, if it were the case that  
11 simply by virtue of publishing it, you expected that it would  
12 be circulated, that would swallow both the single publication  
13 case and the one-year statute of limitations, and no court has  
14 so held.

15 THE COURT: All right.

16 MR. BERLIN: Unless Your Honor has any questions,  
17 I'll sit down.

18 THE COURT: Are there any other defense attorneys who  
19 want to address the statute of limitations issue on behalf of  
20 their clients?

21 MS. GREEN: Your Honor, Dana Green on behalf of *The*  
22 *New York Times*.

23 THE COURT: Yes, ma'am.

24 MS. GREEN: We agree with all the points that  
25 Mr. Berlin has raised on behalf of his client. As Your Honor

1 noted, *The New York Times* is in a somewhat different position  
2 from Dow Jones in the sense that there is at least one pleaded  
3 retweet that is within the statute of limitations. For the  
4 reasons that Mr. Berlin just articulated, however, we do not  
5 believe that that can as a matter of law be deemed to be a  
6 republication of *The New York Times* article.

7 *The Times* article, as Your Honor knows, was published  
8 more than a year before the complaint was filed. Mr. Biss has  
9 argued that there are questions of fact around whether or not  
10 it was republished. Our position would be that republication  
11 is a question of law; and the facts around how this article was  
12 tweeted or published are not in dispute; they're in the  
13 complaint; and that there's no reason why this can't be  
14 resolved on a motion to dismiss.

15 There's no allegation in the complaint that *The Times*  
16 itself retweeted or republished this during the statute of  
17 limitations. The sole allegation is that a journalist for *The*  
18 *Daily Caller* posted a tweet hyperlinking to *The New York Times*  
19 article and making a very brief comment about it.

20 I think that the -- there are two barriers to  
21 treating that as a republication. The first is the hyperlink  
22 issue, which we've just discussed, but even setting aside that  
23 technological issue, the result would be the same if that  
24 journalist from *The Daily Caller* had, for example, printed out  
25 *The New York Times* article and handed it out to his friends or

1 posted it online.

2           The, the *Weaver* case creates a very narrow exception  
3 that in special circumstances can allow a third party to  
4 essentially create liability for the publisher, but the facts  
5 from *Weaver* and all of the cases that have subsequently applied  
6 it are highly distinguishable from the circumstances here,  
7 where there has to be some deliberate intent, some, some clear  
8 expectation by the initial publisher that they are transmitting  
9 it to a third party who will then republish it.

10           And here, Mr. Biss's position seems to be the only  
11 thing that would bring *The New York Times's* article within the  
12 *Weaver* exception is that it is a national news publication.  
13 There's no other distinguishing feature here, and if that were  
14 adopted, essentially every national news article would have  
15 perpetual liability because they are frequently commented on or  
16 distributed or retweeted.

17           Mr. Biss seems to argue that now technology means  
18 that we should rethink that single publication rule, but the  
19 whole purpose of the single publication rule, the reason it was  
20 developed -- and we discussed this in our reply, and I would  
21 direct Your Honor to the *Gregoire* case from New York that has a  
22 very interesting historical discussion of the origins of the  
23 single publication rule. The whole idea behind that was that  
24 in an era of mass media, we, we must -- to make the statute of  
25 limitations effective, we cannot impose liability on publishers

1 for third-party distribution and selling and footnoting and  
2 other distribution of a publication. Otherwise, the single  
3 publication rule would have no meaning.

4 So in contrasting Mr. Biss's position, I would say  
5 the development of new technology, the fact that retweets are  
6 happening is very much in favor of finding that there is no  
7 republication here, that the whole purpose of the single  
8 publication rule is to prevent perpetual liability for mass  
9 media such as *The Times* and the other defendants.

10 THE COURT: All right, thank you.

11 MS. HANDMAN: Your Honor, Laura Handman, Davis Wright  
12 Tremaine, on behalf of NBCUniversal Media and WP Company,  
13 publisher of *The Washington Post*. I'll be extremely brief.

14 *The Washington Post* article that's in suit is within  
15 the statute of limitations. We don't disagree that that is  
16 within the statute.

17 And there are two tweets by -- from the personal  
18 account of Malcolm Nance which are alleged -- he is a  
19 contributor for NBC/MSNBC -- two July 2018 tweets that we don't  
20 say the statute of limitations bars, but there are tweets from  
21 2017 that are barred, and in the amended complaint, plaintiff  
22 added a broadcast of -- *Rachel Maddow* broadcast of May 18,  
23 2018, and the *11th Hour* broadcast of May 18, 2018. That's more  
24 than a year before plaintiff filed his complaint.

25 And notably, unlike these others, there's no

1 allegation of retweeting. Mr. Biss, when he recited the  
2 paragraphs of the complaint, he stopped right at the point  
3 where republication was alleged, he stopped right at the point  
4 where there's discussion of the NBC liability, and there are no  
5 allegations of retweets within the statute of limitations as to  
6 any of those more-than-one-year broadcasts in tweets.

7 THE COURT: All right, thank you.

8 MR. REED: Good morning, Your Honor. Terry Reed on  
9 behalf of the defendant Stefan Halper. First, I would endorse  
10 the comments of other defense counsel on the statute of  
11 limitations issues, and I'll just briefly add one point.

12 This Court was looking for some rule of reason with  
13 respect to application of the republication doctrine, and  
14 fortunately, there is such a rule of reason. It's in the  
15 original 1957 case, the *Weaver* case, and that is, for the  
16 republication to start a new claim or a new statute of  
17 limitations, the original publisher has to in some way  
18 authorize or participate in the, in the republication.

19 Here, what the, what the plaintiff is attempting to  
20 say is that simply if you have a publication and then someone  
21 else uses the internet to talk about that subject matter, that  
22 that is a republication.

23 That is a -- that is a completely independent  
24 publication by a third party, and therefore, as the Court  
25 points out, that is the third party's responsibility, not the

1 original publisher.

2 And if ever there was a technological entity where  
3 that should apply, it would be the internet because no one has  
4 control over what someone else says over the internet. By  
5 definition -- I mean, it might be possible to organize the  
6 campaign, but that's not what's being alleged here, and more  
7 importantly, that's not what's in the, in the complaint.

8 Mr. Biss talks about the pleading. There's no  
9 pleading here that Mr. Halper had any involvement in any of  
10 these internet publications or tweets or anything like that.  
11 So to the extent that he wants to put the republication  
12 doctrine to work, to turn the internet into the Fountain of  
13 Youth for defamation claims, he hasn't even pled the necessary  
14 facts to make that argument.

15 THE COURT: All right.

16 MR. REED: Thank you.

17 THE COURT: Well, the other issue, assuming that the  
18 Court were to find -- and we do have *The Washington Post*, the  
19 two Nance articles, and possibly the one *New York Times* article  
20 within the statute of limitations. Then the second line of  
21 arguments that has been made is that the articles at issue are  
22 themselves not defamatory and that the Court has to make that  
23 decision. That's a question of law.

24 And so, Mr. Biss, again, I'll let you respond to  
25 those arguments. And again, we're confining ourselves at this

1 point for the sake of discussion to just the ones that are  
2 within the statute of limitations.

3 MR. BISS: Yes, Your Honor. Just very, very briefly  
4 on the MSNBC, there's one other publication that is within the  
5 statute of limitations. It's in a December 18, 2018 broadcast.  
6 There's a link to the YouTube video. I believe it's in  
7 paragraph 173. I just wanted to bring Your Honor's attention  
8 just for completeness of the record on MSNBC.

9 And it's a statement that's attributable, made during  
10 the broadcast. It was an MSNBC interview with Ari Melber in  
11 which Mr. Nance states: "within the intelligence community,  
12 the thought was that he" -- referring to General Flynn -- "may  
13 have been a turned agent to Russian intelligence," and it's --  
14 that's within the one-year statute of limitations.

15 THE COURT: Yeah, but as you know, I mean, look,  
16 we're not going to get -- this case is not about Mr. Flynn.  
17 This case is about your client, and there's no question that  
18 anybody who's reading these articles fairly, without any kind  
19 of, you know, bias or orientation, would say these -- if it  
20 were asked of, like, a high school student: Read this article  
21 and tell us what the point of the article is, every one of them  
22 is focusing on Flynn.

23 You may have used it in your papers or your client  
24 may have used it in one of her comments in that BBC interview,  
25 I'm not sure, but wherever it was, I believe somewhere in the

1 papers, there's a reference to the fact that the plaintiff was,  
2 if anything, sort of collateral -- was collateral damage. I  
3 think that's the only appropriate way of looking at these  
4 articles.

5 I mean, these articles were focusing on, on Flynn.  
6 And many of the articles, although they do reference this  
7 meeting at Cambridge, they are also pointing to other -- many  
8 other activities by Flynn with Russian authorities. I mean, he  
9 had dinner with Putin and all that sort of stuff.

10 The other thing is that simply, you know, a real  
11 legitimate issue is that anybody in the position that Flynn had  
12 as the director of the DIA knows that the normal protocol is if  
13 you have any contact with a foreign national, especially a  
14 foreign national of a country with whom the United States has  
15 strained relations, that's supposed to be reported, and that's  
16 discussed in some of these articles.

17 Now, there's a dispute as to whether, you know,  
18 meeting somebody at a dinner is enough of a contact, but it is  
19 interesting, you mentioned -- it's mentioned in the papers, and  
20 I don't think it's being contested, that there was a 20-minute  
21 interaction between your client and Mr. Flynn, and we've been  
22 in court now 40 minutes, so about half of the time we've been  
23 in court, and we've done a lot, in just half of the time,  
24 that's a fairly long interaction. Now, there were other people  
25 present. That's fine.

1 All I'm saying is that if you read these articles and  
2 you read them in totality, it's clear that your client in many  
3 of them isn't even mentioned by name, and that what is  
4 discussed is either opinion, that is, two people were concerned  
5 about this, or are actually factually correct.

6 The only real inaccuracies that I can see from here  
7 are the inaccuracy that your client actually approached Flynn.  
8 That does not appear to be the case. But that is such a benign  
9 statement by itself, that doesn't say anything.

10 So I think you really have an uphill battle on  
11 showing the Court that any of the comments that are within the  
12 statute of limitations would qualify as defamation. So I'll  
13 give you a few minutes to address that.

14 MR. BISS: Judge, the, the question is what is the  
15 gist of the articles, and as the Court knows, you have to look  
16 at everything that's written in the articles.

17 THE COURT: Well, wait. If you're talking about the  
18 gist of the article, I just said I think that any, any fair  
19 reader of the English language who looked at this would say  
20 it's Flynn and it's whether or not he has been compromised  
21 because of his connections to Russia. I mean, I think that's  
22 the clear view.

23 MR. BISS: But within the context of my client, which  
24 is what these articles are about --

25 THE COURT: No, your client -- the articles are not

1 about your client. They're about Flynn, and your client is  
2 peripheral, the same way Andrews is a peripheral. There are  
3 other people who are named in these articles who are  
4 peripherally involved in the overall story, but the story  
5 focuses on Flynn.

6 MR. BISS: Judge, the overall narrative -- I think I  
7 agree with Your Honor to the extent that the overall narrative  
8 here is that there was collusion between Flynn and the  
9 Russians, and the Russians in this case is my client. That's  
10 the Russian who is accused of colluding with Flynn.

11 The statements that are made here are, are -- the  
12 articles are laden with, with facts. For instance, there,  
13 there is reference to Ms. Lokhova as being a foreign stranger  
14 in *The New York Times* article. There is reference to her  
15 working for a Russian state-controlled bank.

16 The impression that the authors of the articles want  
17 to give to the reader is that Ms. Lokhova was either a Russian  
18 official, which she wasn't, which is false, or that she was  
19 part of Russian intelligence, which she wasn't, which is false,  
20 and that she got so close to Flynn that it alarmed or it caused  
21 reports to be made, as they said in both *The Wall Street*  
22 *Journal* article and *The New York Times* article, reports made to  
23 the U.S. intelligence which were not made to the U.S.  
24 intelligence community.

25 There was no closeness. We've alleged why there was

1 no closeness. We've also alleged that in the -- we've also  
2 alleged facts which would show that the whole idea of there  
3 being any alarm or any concern of any kind relating to this  
4 February dinner, which is the -- which is the event, this  
5 February dinner, is obviously untrue because she continued to  
6 have interaction in the Cambridge Intelligence Seminar with  
7 American intelligence officials. They continued to allow her  
8 to be intimately involved in, in publishing papers, and no one  
9 raised any concerns whatsoever about it.

10 But these articles paint the, the picture that she  
11 was acting as a Russian agent or, as they say, a Russian  
12 intelligence official or a Russian official, and that she  
13 approached General Flynn with the -- that she sat next to him,  
14 she approached him, and that the, the gist is that she did it  
15 for the purpose of compromising him, and that's what is so  
16 defamatory about this is their portrayal of her acting on  
17 behalf of the Russian government or being a Russian  
18 intelligence officer, getting close to Flynn and compromising  
19 him.

20 The overall narrative here is that, that, that -- the  
21 narrative that they painted was that Flynn was compromised by a  
22 Russian, and that's, that's the connection that's made to my  
23 client. That's the, the connection here. There's other -- and  
24 I think that, that theme flows through each of the, each of the  
25 articles.

1 But, Judge, when you look at all the words that were,  
2 were used, *The New York Times* article refers to anomalous  
3 behavior. It identifies her as being an employee of a  
4 Russian-controlled state bank. It says that the contact --  
5 suggests that the contact was the subject of an FBI  
6 wide-ranging counterintelligence probe into contacts that the  
7 Trump campaign personnel may have had with Russian officials.

8 It portrays her as being something other than what  
9 she was, which was just an academic. And she went to a dinner  
10 that she was invited to go to, there's no -- there's nothing in  
11 the articles that would put any, any real truthful context in  
12 in terms of why she was there at that dinner. She's invited to  
13 that dinner, and it was all pre-reported, as we allege, to the  
14 DIA, to Flynn's -- who Flynn worked for, who Flynn directed.

15 This was all pre-reported. There's no secrecy in  
16 here. So when they, when they, when they state in here that  
17 there was anomalous behavior, that it came to the attention of  
18 U.S. intelligence, in *The New York Times* article where they say  
19 that the concern was, was strong enough that it prompted a  
20 person to pass on a warning to American authorities that Flynn  
21 could be compromised by Russian intelligence, she's not Russian  
22 intelligence.

23 Nothing happened at that dinner. The, the statements  
24 that are made are false, and the implications that, that arise  
25 from the statements are false as well, and that's why we allege

1 that it carries a defamatory meaning.

2 Because the implication, Judge, is clear that she did  
3 something at this dinner. And yes, she had, as you pointed  
4 out, there was a 20-minute conversation. It was, it was in  
5 front of everybody. Everybody was -- it was like a cocktail  
6 conversation after dinner. That's, that's what the  
7 conversation was.

8 And so that -- how that gets spun into that she's --  
9 she could have compromised him is, is -- that shows that it's  
10 defamatory. You could not possibly take from the fact that  
11 they had a 20-minute public conversation, you couldn't possibly  
12 derive from that the idea that she had done something to  
13 compromise her -- to compromise General Flynn.

14 And again, she's the plaintiff in this case, not  
15 General Flynn. She's the plaintiff, but it is her -- it's the  
16 fact that she is consistently and continually associated with  
17 this idea that he's been compromised and that she's the one who  
18 has done it, that's, that's what is defamatory about this,  
19 because the 20 minutes was it.

20 THE COURT: All right, thank you.

21 MR. BISS: Thank you.

22 THE COURT: All right, who wants to start the  
23 defense?

24 MS. HANDMAN: Yes, Your Honor, thank you. You are  
25 totally correct, Your Honor, that the focus of *The Washington*

1 Post article was indeed Flynn. The actual sentence is:  
2 "During a dinner Flynn attended, Halper and Dearlove" --  
3 another academic -- "were disconcerted by the attention the  
4 then-DIA chief showed to a Russian-born graduate student who  
5 regularly attended the seminars, according to people familiar  
6 with the episode."

7           Nowhere does it say or suggest that she did any  
8 activity whatsoever. They were concerned about his conduct,  
9 his attention to her. Nowhere does it say that she did  
10 anything wrong and that they were concerned about it.

11           Indeed, the fact that she says Mr. Dearlove went on  
12 to continue with her at Cambridge exactly is the point. We  
13 didn't say Mr. Dearlove was disconcerted by her conduct. We  
14 said she was disconcerted by the attention Flynn paid to her.  
15 That's consistent with his continuing to respect her, and we  
16 didn't say otherwise.

17           We did not say that this was reported to the  
18 authorities. We did not say she worked for a Russian-owned  
19 bank. We simply called her a Russian-born grad student, which  
20 is 100 percent true. We didn't even name her. It's a question  
21 of whether it's even of and concerning her.

22           *The Post* has never written about her except in July  
23 of this year, when Congressman Nunes, a client of Mr. Biss's,  
24 referred to her during the Mueller testimony.

25           This is not someone that has been on *The Post* radar,

1 and indeed, the article really was about Stefan Halper. This  
2 was a very, you know, one line basically in this story.

3 So -- and the word "disconcerted" itself is of  
4 subjective opinion. It is a subjective viewpoint, as the case  
5 that -- *Hyland* that Mr. Biss cites, and that is opinion because  
6 it can't be proven true or false whether they were disconcerted  
7 or not.

8 Nor does it -- she says that, well, it was false  
9 because Halper wasn't at the dinner. Well, whether or not he  
10 was at the dinner, he definitely was part of the seminar that  
11 Flynn attended, and he could have heard about what went on and  
12 been disconcerted, and indeed, the whole premise of the lawsuit  
13 is that Halper is spreading his concerns about her to  
14 everybody. That's what is the, the main thrust of the lawsuit.

15 And so that, that he was disconcerted whether he  
16 attended the dinner or not, A, it's not defamatory of her  
17 whether he attended dinner; B, she confirmed in -- an article  
18 of *The Times* of London said he attended. She told *The Post*  
19 when she sent that article everything in it, in it was  
20 accurate.

21 But it really is immaterial whether he attended it or  
22 not. He could still be disconcerted, as was Mr. Dearlove, by  
23 Flynn's attentions, not her conduct.

24 And if I might briefly talk about the MSNBC tweets  
25 that are, you know, within the statute of limitations, both of

1    them are not actionable either. One is clearly not of and  
2    concerning her. If you read the tweet chain, which we've put  
3    in as an exhibit, Mr. Nance starts with a *Washington Post*  
4    article about Maria Butina, a Russian who has been charged with  
5    being a foreign agent, and the rest of the article -- tweets  
6    are all about that.

7                   And someone says to him, "Shall we call her a  
8    sparrow?"

9                   And there is where Mr. Nance impishly says, "The  
10   technical term for sexy women agents is a 'Svetlana.' Smart  
11   ones are 'Natashas.'"

12                  And then the tweet goes on with another picture of  
13   Maria Butina and a cartoon of Natasha the spy from Rocky &  
14   Bullwinkle.

15                  Clearly, referring to a Svetlana is not referring to  
16   this Svetlana, and it is more or less a joke and, you know,  
17   very -- the casual tweet kind of conversation that you would  
18   expect, and it's clearly not about the plaintiff.

19                  The other tweet that is in issue again starts with  
20   Maria Butina, and there's a lot of tweet conversation back and  
21   forth, and again, it refers to -- someone else raises, "Flynn  
22   and Lokhova?"

23                  And Mr. Nance responds with a two-word tweet, "Very  
24   likely."

25                  That again is not actionable because it is

1 speculative supposition. That's exactly the language that the  
2 Fourth Circuit used in the *Biospherics* case and held that that  
3 is not an actionable statement of fact. That's clearly  
4 nonactionable opinion. Theory, conjecture, surmise is not  
5 actionable opinion, and in the context of the tweet in  
6 particular, where as one quote said, it's freewheeling,  
7 anything goes, and the breezy tone, it's clearly not meant as a  
8 statement of fact; it's speculation. So these are both  
9 nonactionable.

10 And if I might just add one last point, the party  
11 here is NBC. Mr. Nance, when they read our first motion to  
12 dismiss, they amended the complaint to add Mr. Nance.  
13 Mr. Nance, no summons has been issued to him. He's not  
14 currently a party. I'm not here on his behalf. I'm not his  
15 counsel.

16 I will say all the reasons why this is not actionable  
17 against NBC is the same -- applies equally to Mr. Nance, but  
18 he's not present.

19 THE COURT: All right.

20 MS. HANDMAN: But NBC has two additional argument --  
21 well, two additional arguments. One is that they're not  
22 vicariously liable for Mr. Nance's personal tweets. It was on  
23 his own account, not MSNBC's Twitter account, not NBC's Twitter  
24 account. It made no reference to them. It linked to no  
25 broadcast, in no way promoted MSNBC or NBC.

1           It was his personal Twitter feed, and a conversation  
2 essentially between him and his followers is how this all came  
3 up, and that's sort of the social media equivalent of by the  
4 water cooler -- a conversation by the water cooler, which the  
5 Fourth Circuit in an excellent opinion by Judge Wilkinson last  
6 year, a unanimous opinion, held that that's exactly the kind of  
7 talk that you can't expect employers to be policing and  
8 proctoring what employees say.

9           And Mr. Nance is not even an employee. I would add  
10 he is a freelancer, a paid contributor, one of over 120 paid  
11 contributors on NBC.

12           You wouldn't expect NBC to be able to keep track of  
13 all the social media by all of those contributors, and as  
14 Wilkinson said, it would have a -- very draconian restrictions  
15 on speech if employers could control these conversations that  
16 are not part of their job.

17           And the final thing I would say for both *The*  
18 *Washington Post* and, and NBC, we have invoked Virginia's new  
19 immunity statute, which applies both to the defamation claim  
20 and the tortious interference claim and provides an immunity  
21 for matters of public concern, which the plaintiff agrees this  
22 matter is of public concern, and the immunity attaches unless  
23 the plaintiff can show that it was published with actual or  
24 constructive knowledge of falsity or in reckless disregard, so  
25 essentially the actual malice standard, and they had not pled

1 that and they cannot plead it.

2 If you just take the list of prior publications from  
3 reputable publishers, that in and of itself precludes a finding  
4 of actual malice as a matter of law is what the D.C. Circuit  
5 said in the *McFarland* case. That's what we have here, a litany  
6 of that, and there's nothing really that contradicts the fact  
7 that they did not know anything they said was false, for all  
8 the reasons that we've said.

9 And in the few of the -- in the -- they say, well,  
10 David Ignatius decided not to publish that the plaintiff had an  
11 affair with Mr. Flynn. Well, *The Washington Post* didn't  
12 publish that the plaintiff had an affair with Mr. Flynn. So  
13 there is nothing there to suggest any knowledge of falsity  
14 about anything that they actually published.

15 And that -- if the Court decides to dismiss, then  
16 we'd also ask for fees under that Virginia statute.

17 THE COURT: All right. Any other -- *The Washington*  
18 *Post* is primarily involved in this argument because of the  
19 statute of limitations. I think the only other possibility is  
20 *The New York Times* if the Court were to find that the hyperlink  
21 brought you within it.

22 Did you want to respond to that at all?

23 MS. GREEN: Your Honor, do you want to hear from *The*  
24 *Times* about the article?

25 THE COURT: If you want to add anything that hasn't

1 already been argued.

2 MS. GREEN: Not particularly, Your Honor. I think  
3 Your Honor's characterization of the articles and the reasons  
4 why they're not actionable is exactly on point.

5 We've raised three, three points in our papers: that  
6 the words themselves don't rise to a defamatory meaning; that  
7 they essentially convey the subjective opinions of two unnamed  
8 sources; and that as a matter of law, it's not of and  
9 concerning Ms. Lokhova.

10 Taken together and in the context of the article,  
11 which was really about an unnamed FBI source's activities which  
12 the president had criticized heavily and which were  
13 controversial and a matter of very significant public interest,  
14 what those activities were, whether they were appropriate or  
15 inappropriate, *The Times* in closing, in describing what the  
16 source's activities were, mentioned that the source had also  
17 had contact with Flynn.

18 The focus of that reporting, the thrust of that  
19 reporting was about the source and about Mr. Flynn. In order  
20 to convey the kind of contact that he had had and the kind of  
21 concerns that he had conveyed, the article mentioned what the  
22 nature of those contacts and concerns were, but those were,  
23 frankly, innocuous and boil down to two sentences: that the  
24 source was, quote, alarmed by the general's apparent closeness  
25 with a Russian woman who was also in attendance, and that the

1 concern was strong enough that it prompted another person to  
2 pass on a warning to the American authorities that Mr. Flynn  
3 could be compromised by Russian intelligence according to two  
4 other people familiar with the matter.

5           And as I said, our argument is first that the fact  
6 that someone subjectively may have felt alarm or concern does  
7 not convey a defamatory meaning about the unnamed women, that  
8 Mr. Biss has raised in his opposition an implication argument.  
9 We don't believe that the innuendo that he argues for is  
10 sustainable based off of those words; and moreover, under  
11 *Chapin* and *White* in this jurisdiction, there must be some  
12 showing that the defendant intended or endorsed the, the  
13 interpretation and innuendo that he suggests, that this woman  
14 was an agent, that, that she was working for Russian  
15 intelligence.

16           We don't believe that that is sustainable or that *The*  
17 *Times* conveyed that meaning. We would agree that the focus  
18 here is on whether or not Mr. Flynn's activities were, were  
19 reasonable or appropriate.

20           Third, that the opinion expressed here, what concerns  
21 one person or alarms one person doesn't concern or alarm  
22 another, and Mr. Biss has argued that nothing that his client  
23 did was, was inappropriate or unprofessional. That may very  
24 well be. Based upon her own description of this interaction,  
25 based upon the undisputed record of this interaction, it is, I

1 think, clear how two people could potentially view it  
2 differently with different contexts, and whether or not that  
3 was appropriately a cause for concern or not is precisely the  
4 kind of relative and subjective opinion that is subject  
5 to protection is not actionable under precedent in this  
6 jurisdiction and elsewhere.

7           And lastly, in terms of the "of and concerning" as a  
8 matter of law, the article, aside from saying that there was a  
9 Russian woman who attended the unspecified event, there's no  
10 other information about this person. *The New York Times*  
11 article does not even convey whether or not the woman was an  
12 academic or associated with Cambridge. It simply identifies  
13 her nationality, which is germane to why, why someone might  
14 have formed some opinion about whether or not Russian  
15 intelligence could have an opportunity to, to compromise Flynn,  
16 and therefore, it is simply not reasonable to say that a reader  
17 would have concluded that that vague allusion was a specific  
18 academic at Cambridge University.

19           THE COURT: All right, thank you.

20           MS. GREEN: Thank you, Your Honor.

21           MR. REED: Your Honor --

22           THE COURT: Yes, sir.

23           MR. REED. Go ahead.

24           MR. BERLIN: I take it -- I'm sorry to interrupt. I  
25 take it you would like not to hear from *The Wall Street Journal*

1 because of the statute of limitations issue?

2 THE COURT: I don't need to hear from you.

3 MR. BERLIN: I understand.

4 MR. REED: Your Honor, Terrance Reed again on behalf  
5 of the defendant Halper, and I agree with the prior comments,  
6 and I'd like to focus solely on the issue of *The Post* article  
7 and to, to point out one additional point, which is that the  
8 article talks about some unidentified third party observing  
9 Mr. Halper and Mr. Dearlove at this dinner.

10 It's not a -- that's not a statement by Mr. Halper.  
11 It's a statement at best of an unidentified third party that he  
12 looked across the table and, and had the subjective opinion  
13 that Mr. Halper and Mr. Dearlove looked disconcerted.

14 Obviously, we agree that that's just an opinion.  
15 It's an opinion of a third-party observer, and it's not a  
16 statement at all of this defendant. Thank you.

17 THE COURT: All right. All right, Mr. Biss, do you  
18 want to respond briefly? Because I have a criminal matter  
19 starting in a few minutes.

20 MR. BISS: Yes, Your Honor, just briefly. Judge, the  
21 one thing that's overlooked here is the, is the fact that there  
22 are allegations in the complaint that these statements are  
23 false. Number one, the allegation in *The New York Times*  
24 article is that Halper is one of the persons that's identified  
25 as the people familiar with the matter. We allege that, and it

1 becomes, it becomes clear given the context of the rest of the  
2 article.

3           They say, "The concern was strong enough that it  
4 prompted another person to pass on a warning to the American  
5 authorities that Mr. Flynn could be compromised by Russian  
6 intelligence . . . ."

7           None of that's true. Not a single part of that  
8 sentence is true. There was no concern, and that can be  
9 proven, provably false. There was no concern expressed by  
10 anybody at that February dinner, none. Not a single one.  
11 Nothing was -- nothing prompted anyone to pass on anything to  
12 U.S. intelligence.

13           And all of the statements that are made in *The New*  
14 *York Times* article, in the parts of the MSNBC argument that are  
15 within the statute of limitations, for instance, there's an  
16 allegation that after May of 2018, an MSNBC employee said --  
17 was laughing and informed the executive producer: "Everyone at  
18 the CIA knows Flynn had an affair with Lokhova." So there's  
19 allegations there that are defamatory.

20           The statement in July of 2018 that -- where Mr. Nance  
21 refers to Ms. Lokhova as a honey pot, these are, these are  
22 words that have incendiary meaning. When you accuse somebody  
23 of being a honey pot, that means you accuse them of trying to  
24 corrupt an American official.

25           And then Nance doesn't just, doesn't just respond.

1 He says -- when the, when the poster says: "Flynn and  
2 Lokhova?" asking who he's referring to, and he says: "Very  
3 likely," that implies a knowledge of a set of facts that would  
4 connect my client to this honey pot, to being a honey pot in  
5 connection with Flynn.

6 It's more than just some amorphous statement. He's  
7 actually -- and he holds himself out as being an intelligence  
8 analyst with 25 years' experience, and he's telling people  
9 based on his experience, it's very likely that she's a honey  
10 pot.

11 And, Judge, I would just submit that in opposition,  
12 that's clearly more than just some innocuous statement.

13 Then on December 18, the MSNBC also publishes a  
14 statement, again it's on national television: "Within the  
15 intelligence community, the thought was that General Flynn may  
16 have been a turned agent to Russian intelligence."

17 The theme throughout these articles is that my client  
18 is Russian intelligence or a Russian official and that she has  
19 gotten close to the director of intelligence, Michael Flynn,  
20 and she's done something that's caused this great alarm and  
21 concern, and the fact is there was no alarm and concern.

22 This is a false narrative that was published to the  
23 world and held out to the world for, for -- that injured my  
24 client, and that's really the -- what this case is all about.

25 THE COURT: All right.

1 MR. BISS: Thank you, Your Honor.

2 THE COURT: Thank you.

3 Well, obviously, as I started at the beginning, we  
4 got this case on Monday, and from the argument, it clearly has  
5 significant implications for First Amendment rights, for  
6 personal rights of individuals who believe that they've been  
7 defamed, and we're going to, obviously, want to give it careful  
8 attention.

9 I will, though, because I don't want the parties  
10 spending resources on discovery at this point, and I'm not sure  
11 where Judge Ellis had left this case, but because I'm going to  
12 be taking these motions under consideration and it will take a  
13 while to get an opinion to you, I'm putting the case on hold.  
14 No discovery, no further expense incurred in this case.

15 We'll get an opinion out to you as soon as possible.  
16 Thank you.

17 MS. HANDMAN: Thank you, Your Honor.

18 MS. GREEN: Thank you, Your Honor.

19 MR. BISS: Thank you.

20 THE COURT: You're all free to go. We'll call the  
21 criminal docket next.

22 (Which were all the proceedings  
23 had at this time.)  
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CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of  
the record of proceedings in the above-entitled matter.

/s/

\_\_\_\_\_  
Anneliese J. Thomson